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# WRONGFUL DEATH: DOES THE NCAA HAVE AN AFFIRMATIVE DUTY TO PROTECT ITS STUDENT-ATHLETES?

RAE-ANNA SOLLESTRE\*

## I. INTRODUCTION

As of 2018, there were 1,036,842 participants in high school football, and many of those players dreamed of becoming a collegiate athlete or even becoming a professional football player.<sup>1</sup> Of those participants, only 73,557 participants or an estimated 6.9 percent proceed to play football at a college level, and only 1.6 percent of college football players can achieve their dream of competing on a professional level.<sup>2</sup> For many young football players, college is a step to their future; it is a necessary step to becoming one of the lucky few. It was at the collegiate level that Jordan McNair was working to be the best that he could be; it was at this level that McNair's journey abruptly and tragically ended. Due to decisions made by staff at the University of Maryland (Maryland), a National Collegiate Athletic Association (NCAA) member-institution, McNair suffered from exertional heat stroke during a conditioning session and tragically died.<sup>3</sup> Thus, McNair's family has sought legal remedy for the actions of both the football coaching staff and the university; however, the question of whether the NCAA should also be held liable for the actions of its member-institution needs answering.

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1. *Estimated Probability of Competing in Professional Athletics*, NCAA.ORG (Apr. 3, 2019), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

2. *Id.*

3. Rick Maese & Roman Stubbs, *U-Md. Releases Report on Jordan McNair, Laying Out Timeline that Led to Player's Death*, WASH. POST, Sept. 21, 2018, [https://www.washingtonpost.com/sports/colleges/u-md-board-of-regents-releases-report-on-jordan-mcnair-laying-out-timeline-that-led-to-players-death/2018/09/21/49331ea0-bda9-11e8-b7d2-0773aa1e33da\\_story.html?utm\\_term=.2551803bc86e](https://www.washingtonpost.com/sports/colleges/u-md-board-of-regents-releases-report-on-jordan-mcnair-laying-out-timeline-that-led-to-players-death/2018/09/21/49331ea0-bda9-11e8-b7d2-0773aa1e33da_story.html?utm_term=.2551803bc86e).

Part II of this Comment will discuss the facts of the McNair case to provide the background of this issue and information regarding heat stroke and wrongful death in athletics. To properly assess potential NCAA liability, Part III will provide the legal authority including the choice of law and applicable wrongful death statutes focusing largely on Maryland<sup>4</sup> and Indiana<sup>5</sup> law. Part IV will then assess whether the NCAA has a duty to protect the health and safety of student-athletes and thus potentially be liable for McNair's death in Maryland or Indiana. This Comment will shed some light on why it is unlikely that the NCAA will be liable for the wrongful death of a student-death in Maryland or Indiana.

## II. FACTUAL BACKGROUND

On May 29<sup>th</sup>, 2018, Jordan McNair, 19 years old,<sup>6</sup> attended Maryland's team conditioning session, which occurred after the team's four-week break, at the practice field instead of the originally scheduled location, Maryland Stadium;<sup>7</sup> however, the session was held immediately after a team break indicating no acclimatization occurred.<sup>8</sup> Acclimatization is defined as a gradual increase in practice intensity with modified work-to-rest-ratio,<sup>9</sup> which did not occur.<sup>10</sup> Additionally, the sudden change from the Maryland Stadium to the practice fields did not allow enough time for the training staff to have a trauma bag or cold water immersion readily available.<sup>11</sup> A trauma bag contains medical supplies including oxygen tanks and masks, AEDs, inhalers, and artificial airways,<sup>12</sup> and cold water immersion utilizes ice and cold water to rapidly cool a person's body temperature.<sup>13</sup>

After the team flexibility and dynamic warmups took place, players ran in groups of ten for 110-yard runs, which were being monitored by the Head

4. The McNair incident occurred in Maryland, so it would be possible for a claim to be filed in this state.

5. The NCAA is located in Indiana; therefore, it may be possible for an Indiana court to have jurisdiction.

6. Maese & Stubbs, *supra* note 3.

7. WALTERS INC., AN INDEPENDENT EVALUATION OF PROCEDURES AND PROTOCOLS RELATED TO THE JUNE 2018 DEATH OF A UNIVERSITY OF MARYLAND FOOTBALL STUDENT-ATHLETE 25–26 (2018), <https://assets.documentcloud.org/documents/4918313/Investigation-in-death-of-Maryland-football.pdf> [hereinafter *Independent Evaluation*] (providing facts of the incident).

8. *Id.* at 25.

9. *Id.* at 6.

10. *Id.* at 64 (suggesting encouragements and reminders to the student-athletes to follow their individual workout plan over the four-week break did not adequately indicate individual fitness).

11. *Id.* at 26, 62.

12. *Id.* at 10–11.

13. NCAA, 2014–15 NCAA SPORTS MEDICINE HANDBOOK, at 41 (Aug. 2014), <http://www.ncaapublications.com/productdownloads/MD15.pdf> [hereinafter *Sports Medicine Handbook*].

Football Athletic Trainer.<sup>14</sup> McNair ran his first seven runs within the allotted time frame; however, during the last repetition, McNair struggled to finish and received medical attention from the athletic trainers on the field who noticed several heat exhaustion symptoms including back and heat cramps, fatigue, and low back pain.<sup>15</sup> Thirty-four minutes passed between the time McNair first started exhibiting symptoms and his removal from the field, but the training staff never assessed or recorded McNair's temperature or vital signs.<sup>16</sup> Ice packs and ice towels were used in an attempt to cool him<sup>17</sup> despite the availability of cold water immersion after he was moved to the training room.<sup>18</sup> McNair's health quickly deteriorated resulting in calling the team physician, 9-1-1, and campus security; however, due to inefficiencies and confusion (e.g., training staff's failure to immediately call 9-1-1 at the onset of symptoms and notify campus security, and failure to meet emergency personnel), McNair did not arrive at the hospital until forty minutes later—about an hour and a half after he first presented symptoms.<sup>19</sup> Upon arrival at the hospital, his temperature was recorded at 106 degrees Fahrenheit,<sup>20</sup> which is above the exertional heat stroke symptom of a temperature over 105 degrees Fahrenheit.<sup>21</sup>

As a result of these mistakes and inefficiencies, McNair died on June 13<sup>th</sup> as a result of heat stroke.<sup>22</sup> Maryland's football staff failed to supply the necessary and proper medical supplies, determine field temperature, and acclimatize athletes.<sup>23</sup> Additionally, the death of McNair is considered a catastrophic event according to both the "University of Maryland Athletics Critical Incident" Guideline and the NCAA Manual requiring prompt documentation of the event, communication with the Critical Incident Management Team, and a detailed summary.<sup>24</sup> Maryland admitted their football

14. *Independent Evaluation*, *supra* note 7, at 26-27 (recognizing that several players appeared fatigued).

15. *See id.* at 28.

16. *Id.* at 29-30.

17. *Id.* at 64.

18. *Id.* at 63.

19. *Id.* at 31-32.

20. Alex Kirshner, *Jordan McNair's Death: What We Know About Maryland and DJ Durkin's Role*, SBATION (Oct. 31, 2018), <https://www.sbnation.com/college-football/2018/8/11/17678652/jordan-mcnair-death-investigation-maryland>.

21. *Independent Evaluation*, *supra* note 7, at 16.

22. Kirshner, *supra* note 20.

23. *Independent Evaluation*, *supra* note 7, at 63-64.

24. *Id.* at 18-19; NCAA, 2018-19 NCAA DIVISION I MANUAL, art. 3, 3.2.4.19 at 12 (Aug. 1, 2018).

training and medical staff failed to diagnose and treat Jordan McNair's exertional heat stroke,<sup>25</sup> and subsequently, Maryland fired its head coach.<sup>26</sup>

Early recognition and treatment of exertional heat stroke is necessary to have the best chance at survival.<sup>27</sup> Experts have determined the survival rate of exertional heat stroke is high.<sup>28</sup> From 1960–2017, 145 heat stroke cases resulted in death connected to football practices alone.<sup>29</sup> As a result, the Annual Survey of Football Injury—a survey prepared for the NCAA, the American Football Coaches Association, National Athletic Trainers' Association<sup>30</sup>—urges a continuous effort to prevent heat stroke in football especially because most deaths occur during practice, not competition.<sup>31</sup> Due to this knowledge, the NCAA and all of its member-institutions should be aware of both procedures and statistics regarding exertional heat stroke in football. Therefore, because Maryland is an NCAA member-institution, it is appropriate to assess whether the failures by the University of Maryland's staff to both diagnose and treat Jordan McNair could cause the NCAA to be liable for Maryland's actions.

### III. LEGAL AUTHORITY

Due to the NCAA's knowledge of heat stroke-related deaths involving football players and the University of Maryland's failure to follow NCAA Manual principles, guidelines, and regulations, it is important to determine whether the NCAA can be liable for the wrongful death of athletes that have suffered from exertional heat stroke.<sup>32</sup> The Manual requires active member institutions to report catastrophic sports injuries, which includes heat stroke, annually to the NCAA and requires student-athletes to complete an annual health and safety survey.<sup>33</sup> Additionally, the NCAA produces a medical

25. Rick Maese et al., *Maryland Football Player Death: University of Maryland Apologizes to Jordan McNair's Family*, WASH. POST, Aug. 14, 2018, [https://www.washingtonpost.com/news/terrapins-insider/wp/2018/08/14/university-of-maryland-apologizes-to-jordan-mcnair-family-for-mistakes-that-our-training-staff-made/?utm\\_term=.bb8e19a84748](https://www.washingtonpost.com/news/terrapins-insider/wp/2018/08/14/university-of-maryland-apologizes-to-jordan-mcnair-family-for-mistakes-that-our-training-staff-made/?utm_term=.bb8e19a84748).

26. Heather Dinich & Darren Rovell, *Maryland Terrapins Football Coach DJ Durkin Fired One Day After Reinstatement*, ESPN, [https://www.espn.com/college-football/story/\\_/id/25137549/maryland-terrapins-coach-dj-durkin-fired-wake-probe?device=featurephone](https://www.espn.com/college-football/story/_/id/25137549/maryland-terrapins-coach-dj-durkin-fired-wake-probe?device=featurephone) (last visited Apr. 24, 2020) (Maryland's President fired coach despite reinstatement of coach following placement on administrative leave).

27. *Independent Evaluation*, *supra* note 7, at 4, 6 (recommending aggressive treatment to lower body temperature within thirty minutes of symptom onset).

28. KRISTEN L. KUCERA, ET AL., ANNUAL SURVEY OF FOOTBALL INJURY RESEARCH 14 (2018), <https://nccsir.unc.edu/files/2013/10/Annual-Football-2017-Fatalities-FINAL.pdf>.

29. *Id.*

30. *Id.* at i.

31. *Id.* at 14.

32. NCAA, *supra* note 24, at art. 2, 2.2.3.

33. *Id.* at art. 3, 3.2.4.19–3.2.4.20.

handbook, which has not been updated since 2014, consisting of *guidelines*—not mandatory rules—for member-institutions to develop their own sports medicine policies according to best current practices.<sup>34</sup> The NCAA only intended for the handbook to provide “guidelines for each institution for developing sports medicine policies appropriate for its intercollegiate athletics program . . . . In other words, these guidelines are not mandates. . . .”<sup>35</sup> The member-institutions, not the NCAA, are responsible for the development and establishment of appropriate sports medicine policies according to the best practices.<sup>36</sup> According to the Sports Medicine Handbook’s guidelines on exertional heat stroke, more deaths from heat stroke occurred from 2005–2009 than any other period in the last thirty years, and it is the third leading cause of sudden deaths in athletes.<sup>37</sup> Guideline 2C in the Sports Medicine Handbook provides the recommended practices to prevent exertional heat stroke including annual initial physical evaluations, previous heat strokes and their risk factors, gradual acclimatization, hydration status, and record of environmental conditions.<sup>38</sup>

In the state of Maryland, a wrongful death action can commence against a person who causes another person’s death.<sup>39</sup> The statute’s definition of “person” includes, but is not limited to, “individual[s], . . . fiduciar[ies], or representative[s] of any partnership, firm, association, public or private corporation, or any other entity.”<sup>40</sup> Maryland permits a deceased’s parent to initiate a wrongful death action as long as the parent was not convicted of a crime under the relevant statute.<sup>41</sup> This action must be filed within three years of the person’s death unless the death was caused by an “occupational disease” defined in the statute or criminal homicide under State or federal law caused the wrongful death.<sup>42</sup> For a tortfeasor<sup>43</sup> to be liable for the deceased’s injuries, the actual harm must be within the scope of danger that can be expected or

34. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 2.

35. *Id.*

36. *Bradley v. Nat’l Collegiate Athletic Ass’n*, 249 F. Supp.3d 149, 174 (D.D.C. 2017).

37. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 39; *see also* KUCERA, ET AL., *supra* note 28, at 15 (requiring staff to know the temperature and humidity during practices and games because a wet-bulb temperature at or above eighty-two degrees Fahrenheit is a risk factor for exertional heat stroke).

38. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 39–40.

39. MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 1974).

40. MD. CODE ANN., CTS. & JUD. PROC. § 3-901(d) (West 1983).

41. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(a) (West 2012).

42. *Id.* at § 3-904(g).

43. *Tortfeasor*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a tortfeasor as a person that commits a tortious act).

anticipated.<sup>44</sup> When multiple negligent acts or omissions have occurred concerning the deceased's death, liability can be avoided should there be an intervening act or omission that is a "superseding cause" of the decedent's harm.<sup>45</sup> "Negligence by a subsequent actor breaks the chain of causation when the action by the subsequent actor is extraordinary and not reasonably foreseeable."<sup>46</sup>

Due to the NCAA's headquarters being located in Indianapolis, Indiana, this wrongful death claim could also be attempted in Indiana. In Indiana, a personal representative of a deceased person whose death was caused by another's wrongful conduct is permitted to initiate a lawsuit against the latter if the deceased would have been able to initiate his own suit against the latter for injury for the same wrongful conduct.<sup>47</sup> This action must be brought within two years of the deceased's death.<sup>48</sup> Additionally, Indiana permits wrongful death actions against corporate entities.<sup>49</sup>

Torts, like wrongful death, are governed differently depending on the state's "choice of law."<sup>50</sup> On the one hand, many states like Maryland follow the First Restatement's traditional test, which governs almost all tort issues,<sup>51</sup> providing that torts are governed within the state that "the last event necessary to make an actor liable for an alleged tort takes place."<sup>52</sup> On the other hand, other states like Indiana follow the Second Restatement's significant relationship test.<sup>53</sup> This test considers "(1) the place where the conduct causing the injury occurred; (2) the residence and place of incorporation and place of business of the parties; and (3) the place where the parties' relationship is centered."<sup>54</sup>

In this case, the University of Maryland, an NCAA member-institution, already admitted its fault for the role it played in the premature death of Jordan

44. *Copsey v. Park*, 160 A.3d 623, 637 (Md. Ct. Spec. App. 2017).

45. *Id.*

46. *Id.* at 639.

47. IND. CODE § 34-23-1-1(1) (1998).

48. *Id.*

49. *See* 12 AM. JUR. TRIALS 317 (2018).

50. *See* Jed J. Borghei, Note, *Class Action Fairness: A Mature Solution to the 23(B)(3) Choice of Law Problem*, 95 GEO. L.J. 1645, 1647 (2007).

51. *Id.*

52. *Id.* (citing Restatement (First) Conflict of Laws § 377 (Am. Law Inst. 1934)); *see* *Richards v. U.S.*, 369 U.S. 1, 16 (1962) (providing the applicable law in wrongful death is generally where the act occurred); *see also* *Waranka v. Wadena Ins. Co.*, 832 N.W.2d 133, 138–139 (Wis. Ct. App. 2013) (precluding wrongful death actions taking place outside of Wisconsin state lines).

53. *See* Borghei, *supra* note 50, at 1647.

54. *Simon v. U.S.*, 341 F.3d 193, 200 (3rd Cir. 2003).

McNair;<sup>55</sup> therefore, it is undisputed that Maryland can be liable for the failures on the medical and training staffs' part to properly diagnose and treat McNair.<sup>56</sup> However, there is still an issue of whether the NCAA could be liable through its member-institution for the death of McNair.

#### IV. NCAA'S POTENTIAL LIABILITY FOR THE DEATH OF JORDAN MCNAIR

##### *A. NCAA and the Health and Safety of Student-Athletes*

To address potential liability, it is important to first address whether the NCAA has a duty to keep its student-athletes safe. "A duty of care may . . . arise where [a supervising entity] assumes such a duty, either gratuitously or voluntarily."<sup>57</sup> The assumed duty must arise out of enough specific, affirmative action to constitute voluntarily undertaking the duty.<sup>58</sup> Once this duty is assumed, the imposition of liability incurs only when the supervising entity fails to act reasonably,<sup>59</sup> but promises and guidelines are not sufficient to indicate the entity actually oversaw and controlled the other entity.<sup>60</sup> When a supervising entity provides guidelines for alleged wrongdoing, the supervising entity is not liable for any subordinate entity's conduct outside of the provided guidelines<sup>61</sup> because an entity's provision of guidelines is not indicative of any control or oversight.<sup>62</sup> Thus, it is unlikely that a court would find the NCAA has an affirmative duty to protect its student-athletes' health and safety because the NCAA never voluntarily assumed the duty to protect its student-athletes.

A voluntary undertaking of a duty cannot be supported by broad generalizations.<sup>63</sup> *McCants v. National Collegiate Athletic Association* was brought as a part of a class action suit against both the NCAA and one of its member-institutions, the University of North Carolina at Chapel Hill alleging negligence and breach of fiduciary duties.<sup>64</sup> The plaintiffs alleged the NCAA had undertaken the voluntary duty to protect the education and educational

55. Maese & Stubbs, *supra* note 3.

56. *Id.*

57. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 550 (Ind. Ct. App. 2015) (citing *Yost v. Wabash Coll.*, 3 N.E.3d 509, 517 (Ind. 2014)).

58. *McCants v. Nat'l Collegiate Athletic Ass'n*, 201 F. Supp. 3d 732, 740 (M.D.N.C. 2016) (finding broad, generalized declarations are insufficient to prove voluntary undertaking of a duty).

59. *Lanni*, 42 N.E.3d at 550.

60. *Yost v. Wabash Coll.*, 3 N.E.3d 509, 519 (Ind. 2014); *see also McCants*, 201 F. Supp.3d at 743.

61. *See Yost*, 3 N.E.3d at 519.

62. *See Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp.3d 149, 174 (D.D.C. 2017).

63. *McCants*, 201 F. Supp.3d at 740.

64. *Id.* at 736.



opportunities of student-athletes<sup>65</sup> and utilized the NCAA's governing documents and statements made to the public through public representations in their attempt to illustrate that the NCAA owed a duty to the plaintiffs to provide "academically sound" educational opportunities to student-athletes.<sup>66</sup> However, the court rejected the plaintiffs' claim because there was no proof the NCAA had a legal duty to protect student-athletes' education resulting from a voluntary undertaking.<sup>67</sup> The court found the assertions made by the NCAA were not specific enough to either the NCAA or the plaintiffs.<sup>68</sup> Additionally, the court elaborated and determined that an activity's regulation is not equivalent to engaging or controlling that activity; therefore, it would not be appropriate to find the supervising entity to be voluntarily undertaking that duty.<sup>69</sup>

Because the NCAA has not voluntarily undertaken the duty to protect student-athletes, it is unlikely that a court would find the NCAA has a duty to protect its student-athletes. Like in *McCants* where the plaintiff relied upon the NCAA's governing documents in its attempt to illustrate the NCAA voluntarily asserted a duty to protect the educational opportunities of its student-athletes,<sup>70</sup> it is likely that the plaintiff, in this case, would rely upon both the NCAA Manual and the NCAA Sports Medicine Handbook to show that the NCAA has a duty to protect the health and safety of student-athletes. However, comparable to *McCants* where the court found the basis of the plaintiff's assertion to be insufficient to constitute a voluntary undertaking by the NCAA,<sup>71</sup> a court would also likely find, in the McNair case, the use of the Manual and the Handbook to be inadequate to support the claim that the NCAA had a duty to protect student-athlete health and safety created from a voluntary undertaking because the Manual and the Handbook were meant to be guidelines—not regulations. Therefore, the broad generalizations made in NCAA governing documents regarding exertional heat stroke do not support the claim that the NCAA affirmatively and voluntarily asserted the duty to protect its student-athletes.

The provision of exertional heat stroke prevention and treatment in the NCAA Sports Medicine Handbook only serves as guidelines, not mandatory rules;<sup>72</sup> therefore, the NCAA did not affirmatively undertake the duty to protect

65. *Id.* at 738.

66. *Id.* at 740–41.

67. *Id.* at 742 (finding even if the NCAA made promises to provide education to student-athletes, those promises would not constitute a voluntarily undertaking).

68. *Id.*

69. *Id.* at 745.

70. *Id.* at 741.

71. *Id.* at 744.

72. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015).

its student-athletes.<sup>73</sup> In *Lanni v. National Collegiate Athletic Association*, the plaintiff fenced as a student-athlete at an NCAA member-institution competing in a competition.<sup>74</sup> After her competition, the plaintiff was struck in the eye while she was within the designated waiting area resulting in severe injury.<sup>75</sup> Hence, the plaintiff filed suit claiming the NCAA breached its duty to both her and other student-athletes.<sup>76</sup> After the plaintiff's injury, the NCAA and its Fencing Committee discussed the issues regarding the current layout of fencing competitions and determined that the fencing strips were too close to each other.<sup>77</sup> Even so, the court concluded the NCAA owed no duties to student-athlete health and safety because the NCAA did not act in any way to indicate it had a duty to supervise or control its member-institutions.<sup>78</sup>

While it is "commendable" for the NCAA to want to be actively involved in their member-institutions provision of safety of student-athletes,<sup>79</sup> a supervising entity providing guidelines and expressing disapproval for the alleged wrongdoing is not liable for their subordinate's conduct done outside of the guidelines.<sup>80</sup> The duty of care can result from "affirmative, deliberate conduct"<sup>81</sup> on the actor's part to assume such a duty of care to perform the task at issue, but the plaintiff failed to illustrate the affirmative action necessary to prove the NCAA was responsible for member-institution oversight, directly or indirectly, regarding student-athlete safety.<sup>82</sup> The evidence proved the NCAA only has duties to provide information and guidance to member-institutions and their student-athletes regarding the safety of student-athletes.<sup>83</sup> While compliance checks occur at member-institutions by the NCAA, "[a]ctual oversight and control cannot be imputed merely from the fact that the NCAA has promulgated rules and regulations and required compliance with" them.<sup>84</sup>

The NCAA's provision of guidelines and regulations is not sufficient to prove it owed student-athletes like Jordan McNair a duty to protect their health and safety.<sup>85</sup> Unlike *Lanni* where the NCAA inspected the competition site

73. *Id.* at 550.

74. *Id.* at 546.

75. *Id.*

76. *Id.* at 548.

77. *Id.* at 553.

78. *Id.*

79. *Id.*

80. *See id.* at 550.

81. *Id.* at 550.

82. *Id.*

83. *Id.* at 553.

84. *Id.*

85. *Id.*

before the plaintiff's injury,<sup>86</sup> the NCAA did not inspect the conditioning site before McNair's exertional heat stroke, which resulted in his untimely death. However, similarly to *Lanni* where the NCAA has provided regulations to protect student-athletes in fencing competitions,<sup>87</sup> the NCAA, in this case, has also produced a Sports Medicine Handbook to provide guidelines to prevent and treat exertional heat stroke. The NCAA's provision of guidance regarding exertional heat stroke is not indicative of the NCAA having a duty to its student-athletes' health and safety, like in *Lanni* where the court determined the NCAA only had a duty to provide information and guidance regarding the health and safety of student-athletes.<sup>88</sup> Additionally, comparable to the court in *Lanni*'s determination that actual oversight and control results from conduct to affirmatively assume that duty,<sup>89</sup> the NCAA, in this case, has not affirmatively assumed the duty to provide actual oversight and control over the health and safety of its student-athletes due to both statements in the NCAA Manual and the NCAA Sports Medicine Handbook.<sup>90</sup> Because the NCAA has not affirmatively undertaken the duty to protect its student-athletes and only provides guidelines for exertional health and safety, the NCAA duty to student-athlete health and safety exists only to the extent of providing information and guidelines to member-institutions regarding health and safety.

At times, medical decisions are necessary to protect the health and safety of student-athletes, but those decisions are not subject to NCAA control and oversight.<sup>91</sup> The plaintiff, in *Bradley v. National Collegiate Athletic Association*, was a student-athlete playing field hockey at a member-institution who was hit in the head during a game and suffered concussion symptoms; however, she was not advised to refrain from practicing or playing whilst experiencing symptoms.<sup>92</sup> Because she was not told to sit out, she continued playing and practicing in field hockey games.<sup>93</sup> Plaintiff asserted the "NCAA undertook and assumed a duty to protect the physical and mental well-being of all student-athletes participating in intercollegiate sports . . . [and] a duty to

86. *Id.*

87. *See id.*

88. *Id.*

89. *Id.*

90. NCAA, *supra* note 24, at art. 2, 2.2.3 (placing the responsibility of student-athlete health and safety on NCAA member-institutions); SPORTS MEDICINE HANDBOOK, *supra* note 13, at 2 (providing only guidance and recommendations, not "rigid requirements" for member-institutions to create their own rules for student-athlete medical safety).

91. *See Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp.3d 149, 173 (D.D.C. 2017).

92. *Id.* at 156–57.

93. *Id.* at 157.

protect student-athletes from brain injuries.”<sup>94</sup> The court found the Sports Medicine Handbook produced by the NCAA only provided general guidance, and it was up to the member-institutions to establish their *own* sports medicine policies for their student-athletes.<sup>95</sup> This handbook did not establish a standard of care but deferred sports medicine policies to the member-institutions to develop.<sup>96</sup> Furthermore, the NCAA could not discipline universities for the failure to adhere to NCAA purposes and policies and in that same vein, the NCAA has no right to control or direct treatment of student-athletes by healthcare providers at the member-institution.<sup>97</sup>

The provision of guidelines for medical treatment by a supervising entity does not give the entity a right to control those decisions.<sup>98</sup> Unlike in *Bradley*, where it is unclear whether medical or training staff checked on the plaintiff to determine if she was “play ready,” Jordan McNair was treated by training staff when initial symptoms occurred.<sup>99</sup> However, similar to the *Bradley* court’s finding that the NCAA is only responsible for providing member-institution guidance,<sup>100</sup> the only duty owed to student-athletes like Jordan from the NCAA is to provide informative guidance to member-institutions about exertional heat stroke prevention. Comparable to *Bradley* where the NCAA provided concussion recommendations and guidelines in the Sports Medicine Handbook,<sup>101</sup> exertional heat stroke risk factors, prevention, and treatment guidelines were also provided in that same handbook by the NCAA.<sup>102</sup> Thus, the duty to provide member-institutions was fulfilled in this case. A court is likely to find the guidelines provided to Maryland and the other member-institutions by the NCAA could not support the idea that the NCAA voluntarily undertook the duty of health and safety, analogous to *Bradley* where the court found the rules the NCAA implemented for member-institutions regarding concussion protocol to be insufficient to prove that the NCAA was actually involved or actively controlling concussion protocols at their member-institutions.<sup>103</sup> Additionally, the court in *Bradley* held the NCAA has no control over how a member-institution’s health care providers treat student-athletes,<sup>104</sup>

94. *Id.* at 168.

95. *Id.* at 174.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Independent Evaluation*, *supra* note 7, at 27-32.

100. *Bradley*, 249 F. Supp.3d at 174.

101. *Id.*

102. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 39.

103. *Bradley*, 249 F. Supp.3d at 168.

104. *Id.* at 174.

so the NCAA should not be responsible for the medical decisions of Maryland's training staff in the treatment of Jordan McNair because the guidelines provided in the NCAA Sports Medicine Handbook are mere recommendations for NCAA member-institutions to craft their own policies fulfilling the only duty of the NCAA to student-athlete health and safety.

For the NCAA to be liable for the Jordan McNair's death, an assessment of whether the NCAA has a duty to protect the health and safety of student-athletes is necessary, which can result from specific affirmative conduct.<sup>105</sup> The provision of guidelines by the supervising entity is insufficient to prove that the supervising entity was in control or oversaw compliance with those guidelines.<sup>106</sup> It is unlikely that a court will find the NCAA owed an affirmative duty to protect student-athlete safety because the guidelines regarding exertional heat stroke are not indicative of the NCAA's control or oversight of those guidelines—including directing or controlling medical treatment—and simply providing guidelines cannot support a claim of an affirmative duty.

### *B. Liability in Maryland*

Because the harm inflicted upon Jordan McNair occurred in the state of Maryland, the potential liability of the NCAA should first be assessed based on the application of Maryland law. In Maryland, a wrongful death action “may be maintained against a person whose wrongful act causes the death of another,”<sup>107</sup> which can be incurred against “an individual, . . . or any partnership, firm, *association*, public or private corporation or entity.”<sup>108</sup> A wrongful act is defined as “an act, neglect, or default . . . which would have entitled the party injured to maintain an action and recover damages” if not for death.<sup>109</sup> This definition requires a showing by the plaintiff that the wrongful act was a “proximate cause” of death.<sup>110</sup> Additionally, it must be proven that the defendant's alleged wrongful act more likely than not caused death.<sup>111</sup> If the defendant has a duty to protect the deceased, the wrongful act done must

105. *McCants v. Nat'l Collegiate Athletic Ass'n*, 201 F. Supp. 3d, 732, 740 (M.D.N.C. 2016).

106. *See Bradley*, 249 F. Supp.3d at 174.

107. MD. CODE ANN., CTS. & JUD. PROC. § 3-902 (1974).

108. MD. CODE ANN., CTS. & JUD. PROC. § 3-901 (1983) (emphasis added).

109. *Id.*

110. *Fennell v. S. Md. Hosp. Ctr. Inc.*, 580 A.2d 206, 211 (Md. 1990) (discussing the defendant's wrongful act does not need to be the only cause but should have contributed substantially to the injury); *see Weimer v. Hetrick*, 525 A.2d 643, 652 (Md. 1987) (finding it is the plaintiff's responsibility to prove under the preponderance of the evidence standard the defendant's wrongful act proximately caused the death).

111. *Fennell*, 580 A.2d at 211; *Weimer*, 525 A.2d at 652; *See also* *State of Md. v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 418 (4th Cir. 1949) (applying Maryland laws holding actual proof is required to prove that if not for the defendant's action, then the injury or death would not have occurred).

constitute negligence on the defendant's part and be a substantial part of the deceased's death.<sup>112</sup>

Before the question of whether the NCAA can be liable for Jordan McNair's death, a duty must exist for Maryland to protect its student-athletes' health and safety.<sup>113</sup> It has been established that a special relationship can create a duty when one party voluntarily undertakes that duty requiring the party to act as a reasonably prudent person,<sup>114</sup> and many courts have found that universities' special relationship with student-athletes require universities to "provide preventative measures in the event of a medical emergency."<sup>115</sup> Because of this, it is likely a court would find Maryland owed a duty to reasonably protect its student-athletes, which could be the basis of liability for wrongful death action.

To assess whether the NCAA could be liable for the actions of Maryland, the doctrines of vicarious liability or *respondeat superior* must be assessed. In Maryland, a corporate employer can be held liable for its employee's tortious conduct when the employee acts within the scope of his or her employment.<sup>116</sup> Acts conducted to benefit the employer's business with authorization constitute within the scope of employment.<sup>117</sup> Additionally, the duty of one party to protect the other should exist.<sup>118</sup> In this case, the NCAA member-institutions are responsible for applying and enforcing the rules within the NCAA Manual.<sup>119</sup> Among these rules, the member-institutions are responsible to protect the health and safety of their student-athletes.<sup>120</sup> Therefore, because the Maryland training and medical staff did not properly diagnose and treat McNair's exertional heat stroke, Maryland could potentially be liable for the

112. *Manor Real Estate & Trust Co.*, 176 F.2d at 418.

113. *See id.*

114. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 550 (Ind. Ct. App. 2015).

115. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3rd Cir. 1993); *see* *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 553 (Ind. 1987) (holding schools have a duty to exercise ordinary and reasonable care for their student-athletes' safety); *see also* *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 29 (N.Y. 1989) (finding when a student-athlete voluntarily participates in extracurricular athletics, schools owe a reasonable standard of care).

116. *Women First OB/GYN Assoc., L.L.C. v. Harris*, 161 A.3d 28, 34 (Md. Ct. Spec. App. 2017); *see also* *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 418 (Md. 1883) (establishing agents' commission of a tort can cause either separate or joint liability for the agents' employer).

117. *S. Mgmt. Corp. v. Taha*, 836 A.2d 627, 638 (Md. 2003).

118. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 550 (Ind. Ct. App. 2015); *see also* *State of Md. v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 418 (4th Cir. 1949).

119. NCAA, *supra* note 24, at art. 1, 1.3.2.

120. *Id.* at art. 2, 2.2.3.

actions of their employees.<sup>121</sup> Similarly, it would be possible to bring a wrongful death claim in Maryland against the NCAA due to its relationship with Maryland. However, because the NCAA has not voluntarily undertaken the duty to oversee and control the actions of its member-institutions, it is unlikely the NCAA would be liable for McNair's death.

Additionally, a tortfeasor is liable for the deceased's injury or death as long as the injury was within the scope of the danger of the activity.<sup>122</sup> However, when there are intervening forces, this chain of causation can be broken if the action taken is not reasonably foreseeable and outside of the normal activity.<sup>123</sup> Here, it is unclear whether the likelihood of the athletic training staff failing to follow proper protocol regarding this kind of injury was foreseeable,<sup>124</sup> and assuming the Maryland athletic training staff regularly followed protocol, it would be difficult to prove the NCAA would be liable for their wrongful actions (i.e., failure to provide adequate cooling and diagnosis of McNair's exertional heat stroke symptoms)<sup>125</sup> because Maryland had implemented a plan for the prevention of heat stroke that utilizes the best practices indicated by the NCAA including assessment of heat stroke risk factors and emergency care for exertional heat stroke.<sup>126</sup> The university acknowledges the failure of the athletic and medical staff to properly diagnose and treat McNair's symptoms as well as the delay in contacting emergency medical services, but it would appear McNair's death was preventable.<sup>127</sup> Furthermore, it would be unforeseeable Maryland would fail to comply with its *own* exertional heat stroke prevention plan. Therefore, even if the NCAA had a duty to protect its student-athletes, it would be unlikely for the NCAA to be liable.

Even though a court would likely find Maryland to be liable for Jordan McNair's death due to Maryland's special relationship with its student-athletes, it is unlikely that a court would find the NCAA to be liable for the death because the NCAA has not voluntarily undertaken the duty to protect its student-athletes, and it is not reasonably foreseeable that McNair's death would have occurred.

121. Kirshner, *supra* note 20; see *Independent Evaluation*, *supra* note 7, at 62–64 (observing the staff failed to provide the necessary and proper medical and safety equipment for football conditioning, failed to provide immediate and aggressive cooling to McNair, failed to provide acclimatization, failed to follow emergency protocol, etc.).

122. *Copsey v. Park*, 160 A.3d 623, 637 (Md. 2017).

123. *Id.* at 639.

124. Talia Richman, *What We Learned from University of Maryland Football Culture Report After Jordan McNair's Death*, BALT. SUN, Oct. 26, 2018, <https://www.baltimoresun.com/sports/terps/tracking-the-terps/bs-md-maryland-football-takeaways-20181025-story.html> (providing the toxic culture was not directly responsible for the McNair's death but the dysfunction was rampant within the athletic department as a whole).

125. *Independent Evaluation*, *supra* note 7, at 63–64.

126. *Id.* at 16.

127. Maese & Stubbs, *supra* note 3.

*C. NCAA Liability in Indiana*

Because the NCAA is headquartered in Indiana, an assessment of whether the NCAA could be liable under the Indiana wrongful death statute would be helpful. Courts, in Indiana, apply the law where the tort incurred unless there are no “significant contacts” to apply that state’s law.<sup>128</sup> Generally, the place where the wrongful act took place is significant and considered to be the place with the most significant contacts,<sup>129</sup> and Indiana applies the traditional “*lex loci delicti*” rule, which means that the law of the state where the wrong took place applies.<sup>130</sup> However, if that is not the place the tort occurred, other contacts with the state of Indiana are utilized to determine whether Indiana law will be applied.<sup>131</sup> Indiana’s choice-of-law for tort action incurred outside of the state is analyzed by the substantial contacts test considering “(1) the place [or places] where the conduct causing the injury occurred; (2) the residence or place of business of the parties; and (3) the place where the relationship is centered.”<sup>132</sup> This list is not exclusive but any contacts should be “evaluated according to their relative importance to the particular issue[] being litigated.”<sup>133</sup> For Indiana law to be applied, the contacts must clearly indicate that the alleged tort and its parties were connected to the state.<sup>134</sup>

First, the court would assess where the injury occurred to determine whether significant contacts exist.<sup>135</sup> The relevant conduct is defined as the “last significant act” in which the injury occurred.<sup>136</sup> It is undisputed that the conduct resulting in McNair’s death occurred in the state of Maryland, not Indiana.<sup>137</sup> Because McNair’s death occurred in Maryland, the place of the tort is not connected to Indiana—meaning this factor favors Maryland.<sup>138</sup> Therefore, the place in which the tort incurred does not bear much weight in this case.<sup>139</sup> The

128. *Simon v. U.S.*, 341 F.3d 193, 199 (3rd Cir. 2003).

129. *Id.* at 198–99.

130. *Simon v. U.S.*, 805 N.E.2d 798, 805 (Ind. 2004).

131. *Id.* (finding the presumption that the state in which the wrong took place is not indisputable); *see Hubbard Mfg. Co. v. Greeson* 515 N.E.2d 1071, 1073 (Ind. 1987) (finding if the state with the most significant contacts is another state, the court must consider the parties’ related actions in those states).

132. *Simon*, 805 N.E.2d at 806; *see also* 12 AM. JUR. TRIALS 317 (2019).

133. *Simon*, 341 F.3d at 198–99 (citing *Hubbard Mfg. Co.*, 515 N.E.2d at 1073).

134. *See Hubbard Mfg. Co.*, 515 N.E.2d at 1074 (finding that the Court of Appeals erred when it applied Illinois law because all three factors indicated there were significant contacts with the state of Indiana).

135. *Simon*, 341 F.3d at 200.

136. *Id.* at 204; *see also Hubbard Mfg. Co.*, 515 N.E.2d at 1073.

137. *Independent Evaluation*, *supra* note 7, at 25.

138. *See Hubbard Mfg. Co.*, 515 N.E.2d at 1074.

139. *Simon v. U.S.*, 805 N.E.2d 798, 806 (Ind. 2004) (finding the place of the tort to be insignificant because the tort occurred outside of Indiana and none of the involved parties were Indiana residents).



second factor to consider is the place of residence or place of business.<sup>140</sup> The NCAA is headquartered in Indiana, which indicates Indiana as its principle place of business;<sup>141</sup> however, because the Maryland staff conducted the wrongful action in the state of Maryland, this factor does not clearly favor Maryland or Indiana.<sup>142</sup> Thirdly, the center of the parties' relationship is not entirely clear because there are no indications that McNair and the NCAA were ever within the same state<sup>143</sup> nor are there any indications that Maryland frequently visited Indiana.<sup>144</sup> Therefore, the third factor does not clearly favor either forum. While the NCAA is currently headquartered in Indiana, the other involved parties are not Indiana residents. Because it is unlikely for Indiana's law to govern this tort action, it is unnecessary to do a full analysis of Indiana's wrongful death statute to determine whether the NCAA could be held liable in Indiana.

#### *D. Suggestion*

NCAA has received ample knowledge about the dangers regarding exertional heat stroke; therefore, it seems that it would be imperative for an affirmative duty to be placed upon the NCAA comparable to that imposed on the NCAA to prevent concussions.<sup>145</sup> Eric Breece, the NCAA's Coordinator of Championships and Alliances, has stated it is wrong for a student-athlete to get seriously injured while competing or practicing for a member-institution if the injury could have been reasonably prevented by safety precautions.<sup>146</sup> But it appears that despite this statement, the NCAA as an association has not affirmatively asserted any right of control over the treatment of student-athletes' healthcare at any of their member-institutions because the Sports Medicine Handbook produced by the NCAA only provides guidance for the member-institutions<sup>147</sup> and the NCAA Manual gives the duty of student-athlete health and safety to its member-institutions.<sup>148</sup> The Sports Medicine Handbook specifically states it only provides guidelines—not mandatory rules or

140. *Simon*, 341 F.3d at 199.

141. *Id.* at 205.

142. *Id.* at 199 (finding where the parties have different places of businesses, this factor does not indicate one state's jurisdiction over another).

143. *Id.*

144. *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1074 (Ind. 1987) (finding recurrent visits to Indiana to conduct business was sufficient to indicate the application of Indiana law).

145. *See generally* SPORTS MEDICINE HANDBOOK, *supra* note 13 (providing multiple references to the dangers related to heat-related strokes).

146. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 543 (Ind. Ct. App. 2015).

147. *Bradley v. Nat'l Collegiate Athletic Ass'n*, 249 F. Supp.3d 149, 173 (D.D.C. 2017).

148. NCAA, *supra* note 24, at art. 2, 2.2.3.

regulations—for member-institutions to help create appropriate sports medicine policies of their own.<sup>149</sup> Therefore, the NCAA has not affirmatively and voluntarily undertaken the responsibility of ensuring member-institutions abide by these guidelines to protect their student-athletes safety.<sup>150</sup> Instead, the responsibility is deferred to the member-institutions.<sup>151</sup>

This deferment appears to be antithetical to the commitment described in the Manual because it seems counterintuitive to “commit” oneself to the health and safety of student-athletes but fail to create mandatory regulations to ensure health and safety. For example, almost 4.5 million current and former student-athletes of member-institutions sought a class action suit against the NCAA asserting the NCAA’s failure to provide adequate guidelines for concussion-management to protect student-athletes.<sup>152</sup> This class asserted that this failure on the part of the NCAA put them more at risk for subsequent concussions.<sup>153</sup> In considering the proposed settlement, the court found determinations of whether the NCAA breached a duty to protect its student-athletes requires individual fact-based determinations regarding concussion-related risks because the nature and the extent of the applicable concussion protocols are essential to the plaintiffs’ claims against the NCAA, which largely vary depending on the actions taken by both the NCAA and the particular member-institution.<sup>154</sup> Thus, assumptions of the NCAA’s legal duty to protect student-athletes health are insufficient on their own to establish that NCAA liability nationwide even if the NCAA had a legal duty to know what every school was doing regarding concussions during the relevant period.<sup>155</sup> While the settlement does not expressly acknowledge whether the NCAA had a duty to know what every member-institution was doing for all of its sports for concussion protocol,<sup>156</sup> the court indicates a high degree of causation where there is a bodily injury class action depends on the rules, equipment, circumstances, and involved staff adopted for each individual sport.<sup>157</sup> Therefore, due to the fact-intensive nature, it would be unlikely for a class action suit to span multiple sports and multiple

149. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 12.

150. *Bradley*, 249 F. Supp.3d at 174; *Lanni*, 42 N.E.3d at 553.

151. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 2.

152. *In re Nat’l Collegiate Athletic Ass’n Student Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 584, 593 (N.D. Ill. 2016).

153. *Id.* at 585.

154. *Id.* at 594-95 (establishing individual actions would better suit the needs of the plaintiffs).

155. *Id.* (refusing to find the NCAA had a duty to regulate and enforce safety rules upon its member institutions).

156. *Id.* at 594.

157. *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Injury Litig.*, MDL No. 2492, 2016 WL 3854603, \*6, (N.D. Ill. 2016).

member-institutions.<sup>158</sup> Instead, the governing law is from the state in which the wrongful act took place, which prohibits any nationwide personal injury class action suits.<sup>159</sup>

It is evident from this class action settlement that there was such a broad variation among member-institutions' implementations of concussion protocol.<sup>160</sup> For example, some schools merely warned student-athletes about the risk of head injuries and concussion; whereas, some schools provided baseline testing for concussions in addition to warnings.<sup>161</sup> Therefore, the court could not conclude that the class was injured in the same way.<sup>162</sup> But it still appears to not be completely logical for the NCAA's lack of duty to protect student-athletes when there is a complete lack of consistency of implementing concussion protocol across the different sports and all NCAA member-institutions.<sup>163</sup> The NCAA acknowledged the possible dangers of concussions in 1999 when they conducted a study examining the effects of concussions in former student-athletes who participated in football.<sup>164</sup> Additionally, in an annual survey provided to the NCAA regarding football-related fatalities, concern with concussion and brain injury fatalities was of the utmost importance.<sup>165</sup> Therefore, it is difficult to imagine why the NCAA, who has established a "commitment" to student-athlete health and safety, would fail to provide better protection to its student-athletes especially with twenty years of knowledge regarding the dangers of concussions and head injury.<sup>166</sup>

Previous cases have generally ruled that the NCAA has no affirmative duty to protect the physical and mental health and safety of its student-athletes while student-athletes are participating in intercollegiate athletics despite producing policy and medical guidelines enacted for the protection of student-athletes.<sup>167</sup>

158. *Id.*

159. *In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Injury Litig.*, 314 F.R.D. at 596.

160. *Id.* at 593.

161. *Id.* at 593-94.

162. *Id.* at 595.

163. *Id.* at 594.

164. Brian Burnsed, *NCAA Funds Study Examining the Long-Term Effects of Concussions in Sports*, NCAA, <http://www.ncaa.org/sport-science-institute/ncaa-funds-study-examining-long-term-effects-concussions-sports> (last visited Apr. 24, 2020).

165. *See generally* KUCERA, *supra* note 28.

166. *See* Burnsed, *supra* note 164.

167. *See* Bradley v. Nat'l Collegiate Athletic Ass'n., 249 F.Supp.3d 149, 168 (D.D.C. 2017) (rejecting the defendant's motion to dismiss because it was not completely clear the defendant's actions were not negligent nor resulting from a duty); *see also* McCants v. Nat'l Collegiate Athletic Ass'n, 201 F. Supp.3d 732, 740 (M.D.N.C. 2016) (finding the NCAA did not partake in specific, affirmative conduct to render a voluntary undertaking to protect student-athlete educational opportunities); *see also* Lanni v. Nat'l Collegiate Athletic

Similarly to the concussion settlement where the NCAA lacked a duty to enforce uniform concussion protocol in an effort to better protect student-athletes from head trauma, the NCAA has no duty to know and enforce every member institution's plan regarding exertional heat stroke.<sup>168</sup> Even though the duty of the health and safety of student-athletes does not fall to the NCAA but rather to each member-institution, it would seem counter-intuitive that the NCAA as a whole does not have any kind of affirmative duty to ensure compliance, which was reiterated in the concussion settlement.<sup>169</sup>

This seemingly antithetical finding of the courts applies equally to both concussion protocol and exertional health and safety. The NCAA Manual establishes NCAA commitment to student-athlete well-being by establishing an environment that fosters safety between the student-athletes and the member-institutions' representatives.<sup>170</sup> But is it really committed to student-athlete health and safety when the NCAA has failed to implement policies and procedures that actually protect student-athlete health and safety, especially in the case of concussion protocol and exertional heat stroke? The NCAA's lack of liability despite their apparent "commitment" to student-athlete well-being is nonsensical when there is a well-documented risk of athletes experiencing exertional heat stroke as well as complications as a result of brain injuries or concussions.<sup>171</sup> Similarly, it is known and therefore foreseeable that concussions and head trauma can result in chronic traumatic encephalopathy (CTE), depression, lowered cognitive functioning, etc.,<sup>172</sup> and as a result of this knowledge, the NCAA implemented its "Concussion Safety Protocol" following the concussion litigation requiring involvement from the NCAA regarding the implementation of each member-institution's concussion safety protocol.<sup>173</sup> This change potentially created an affirmative duty to help member-institutions in ensuring concussion safety by the NCAA.<sup>174</sup> However, unlike the potential duty created by the implementation of the Concussion Safety Protocol, a similar rule had not been launched by the NCAA for exertional heat stroke.

Ass'n, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015) (finding the plaintiff failed to illustrate that the NCAA owed a duty to their student-athletes).

168. *Bradley*, 249 F. Supp.3d at 173.

169. NCAA, *supra* note 24, at art. 2, 2.2.3.

170. *Id.* at "Commitments to the Division I Collegiate Model."

171. *See Independent Evaluation*, *supra* note 7, at 4; SPORTS MEDICINE HANDBOOK, *supra* note 13, at 56–57 (Aug. 2014). KUCERA, *supra* note 28, at 11–12 (providing a multitude of recommendations and sources to create proper concussion protocol for football programs).

172. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 421 (3rd Cir. 2016); *In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 593 (N.D. Ill. 2016).

173. *See generally* NCAA, *supra* note 24, at art. 3, 3.2.4.18.1.

174. *See Schmitz v. Nat'l Collegiate Athletic Ass'n*, 67 N.E.3d 852, 867–68 (Ohio Ct. App. 2016).

According to experts, exertional heat stroke is survivable when the person is cooled down to below 104 degrees.<sup>175</sup> As indicated in the NCAA's Sports Medicine Handbook, there are several ways the NCAA outlined to both identify and prevent exertional heat stroke in student-athletes,<sup>176</sup> but because the NCAA's handbook is only meant to provide guidelines for its member-institutions, there is no duty of care required of the NCAA beyond a duty to provide its member-institutions with health and safety information for its student-athletes. The only mention of any heat-related injuries or strokes is in the requirement of member-institutions to report any "student-athlete catastrophic fatalities, near fatalities and catastrophic injuries"<sup>177</sup> annually to the NCAA. This regulation does not require any member-institutions to take any particular action regarding the implementation of an NCAA safety protocol for exertional heat stroke.<sup>178</sup> However, the lack of duty and regulation does not make sense, especially considering the foreseeability of complications due to improper diagnosis of exertional heat stroke in student-athletes—especially those competing in warm temperatures—or a complete failure to diagnose exertional heat stroke like in Jordan McNair's case.<sup>179</sup>

Due to the knowledge regarding heat stroke, the NCAA should affirmatively accept the same kind of duty for exertional heat stroke based both on the knowledge available and the potential for detrimental health risks associated with exertional heat stroke as it did with concussions. As it is currently, the NCAA only has duties to guide and inform member-institutions and their student-athletes about health and safety risks,<sup>180</sup> but due to the detrimental and preventable health risks concerning heat stroke when not properly diagnosed and treated, the NCAA should deliberately create a duty to ensure the safety of its athletes by insuring its member-institutions comply with protocol. The NCAA had outlined numerous risk factors including dehydration, improper acclimatization, high heat and humidity combination, and the intensity of exercise; these risk factors are indications that exertional heat stroke would be foreseeable if the risk factors are met.<sup>181</sup> Additionally, according to research, an extremely high percentage of people cooled to the proper temperature within

175. *Independent Evaluation*, *supra* note 7, at 6. Melissa Block, *Researching Heatstroke in Athletes*, NPR (Aug. 26, 2018, 8:46 AM), <https://www.npr.org/2018/08/26/642008040/researching-heatstroke-in-athletes>.

176. SPORTS MEDICINE HANDBOOK, *supra* note 13, at 39–40.

177. NCAA, *supra* note 24, at art. 3, 3.2.4.19.

178. *See id.*

179. KUCERA, *supra* note 28, at 14. Block, *supra* note 175 (explaining that due to student-athletes' lack of power, the NCAA has the responsibility to ensure injuries like complication with heat stroke can no longer occurring any sport including football).

180. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 42 N.E.3d 542, 553 (Ind. Ct. App. 2015).

181. *See generally* SPORTS MEDICINE HANDBOOK, *supra* note 13, at 41–42.

thirty minutes of exhibiting heat stroke symptoms survived heat stroke.<sup>182</sup> Therefore, it would be a disgrace and an antithesis to the commitments outlined in the NCAA Manual for the NCAA not to do everything in its power to ensure student-athletes are competing in a safe environment.<sup>183</sup> In the words of Eric Breece, the NCAA's Coordinator of Championships and Alliances, "any serious injury' at an NCAA event 'is unacceptable if reasonable safety measures could prevent' the injury."<sup>184</sup>

## V. CONCLUSION

The tragedy of Jordan McNair's death as a result of heat stroke while practicing for the University of Maryland football team should not have occurred. Numerous mistakes were made by the athletic training staff including failure to properly diagnose and treat McNair's exertional heat stroke, failure to acclimate McNair after a four-week break, lack of immediate cooling, and failure to promptly call 9-1-1.<sup>185</sup> This incident is one that has shocked millions of people across the country, and in light of the horrors surrounding other recent athletic institutions' missteps, it is one that will be scrutinized closely. While there is no way of knowing definitively how the lawsuit is going to turn out, one thing is for certain: currently, the NCAA is unlikely to have a duty to ensure and protect the health and safety of its student-athletes because that duty lies solely on each member-institution and the NCAA has not deliberately and voluntarily undertaken that duty. It is the harsh truth; however, it only takes one incident to turn the tide. While it is confusing and maybe even despicable that the NCAA lacks a duty to protect the well-being of the student-athletes at its member-institution, this case could potentially implement a duty to ensure that its member-institutions are properly following protocol especially concerning a medical stroke that could have been easily remedied.

182. Block, *supra* note 175; KUCERA, *supra* note 28, at 15.

183. NCAA, *supra* note 24, at "Commitments to the Division I Collegiate Model."

184. Lanni, 42 N.E.3d at 543.

185. See generally *Independent Evaluation*, *supra* note 7, at 62-66.